Nos. 14-1418, 14-1453, 14-1505, 15-35,
15-105, 15-119 & 15-191

IN THE

Supreme Court of the United States

DAVID A. ZUBIK, *et al.*,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD, FIFTH, TENTH AND DC CIRCUITS

BRIEF *AMICI CURIAE* OF FORMER STATE ATTORNEYS GENERAL, FORMER UNITED STATES DEPARTMENT OF JUSTICE OFFICIALS AND PROFESSORS OF CRIMINAL LAW IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI* .....

STATEMENT AND SUMMARY OF ARGUMENT ...

ARGUMENT .....

I. PETITIONERS' "MORAL COMPLICITY" CLAIM DOES NOT SATISFY RFRA'S SUBSTANTIAL BURDEN STANDARD .....

A. Substantial Burden Is An Objective, Legal Question To Be Answered By Courts. .....

B. The Accommodation Does Not Impose A Substantial Burden On Petitioners' Religious Exercise. .....

II. PETITIONERS' "MORAL COMPLICITY" CLAIM HAS NO ANALOGY IN THE LAW OF SECONDARY CRIMINAL LIABILITY .....

A. Criminal Complicity Requires Intent to Facilitate The Commission of An Offense. .....

Table of Contents

Page

B. Petitioners Could Not Be Held Vicariously Liable For Actions That Federal Law Compels Insurers and TPAs To Take. .....

III. PETITIONERS' OBJECTION TO PROVIDING TRUTHFUL INFORMATION TO OBTAIN AN EXEMPTION FROM THE COVERAGE REQUIREMENT THREATENS TO ERODE THE PROPER FUNCTIONING OF GOVERNMENT .....

CONCLUSION .....

TABLE OF CITED AUTHORITIES

Page

CASES

Bowen v. Roy,
476 U.S. 693 (1986) .....

Bozza v. *United States*,
330 U.S. 160 (1947) .....

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) ..... *passim*

Catholic Health Care Sys. v. Burwell,
796 F.3d 207 (2d Cir. 2015) ..... *passim*

Charles Peckat Mfg. Co. v. Jarecki,
196 F.2d 849 (7th Cir. 1952) .....

E. Tex. Baptist Univ. v. Burwell,
793 F.3d 449 (5th Cir. 2015) .....

Emp't Div., Dep't of Human Res. of Or. v. Smith,
494 U.S. 872 (1990) .....

Geneva Coll. v.
Sec'y of U.S. Dep't of Health & Human Servs.,
778 F.3d 422 (3d Cir. 2015) .....

Hicks v. United States,
150 U.S. 442 (1893) .....

Cited Authorities

Page

Kaemmerling v. Lappin,
553 F.3d 669 (D.C. Cir. 2008) .....

Little Sisters of the Poor Home for the Aged v. Burwell,
794 F.3d 1151 (10th Cir. 2015) .....

Mich. Catholic Conference & Catholic Family Servs. v. Burwell,
755 F.3d 372 (6th Cir. 2014) .....

Mich. Catholic Conference v. Burwell,
807 F.3d 738 (6th Cir. 2015) .....

Pereira v. United States,
347 U.S. 1 (1954) .....

Priests for Life v. U.S. Dep't of Health & Human Servs.,
772 F.3d 229 (D.C. Cir. 2014) ..... *passim*

Rosemond v. United States,
134 S. Ct. 1240 (2014) .....

Suzy's Zoo v. Comm'r,
273 F.3d 875 (9th Cir. 2001) .....

United States v. Akiti,
701 F.3d 883 (8th Cir 2012) .....

Cited Authorities

Page

United States v. Easter,
66 F.3d 1018 (9th Cir. 1995) .....

United States v. Menasche,
348 U.S. 528 (1955) .....

United States v. Peoni,
100 F.2d 401 (2d Cir. 1938) .....

Univ. of Notre Dame v. Burwell,
786 F.3d 606 (7th Cir. 2015) .....

STATUTES & REGULATIONS

42 U.S.C. § 2000bb—1(a) .....

45 C.F.R. § 147.131(c)(2)(i)(A) .....

Pub. L. No. 111-148, 124 Stat. 119 .....

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§ 13.2 (2003) .....

2 Wayne R. LaFave, Substantive Criminal Law
§ 13.2 (2d ed. 2015) .....

Cited Authorities

Page

Rest. (First) Agency § 140 (Am. Law Inst. 1933) .....

Rest. (First) Agency § 212 (Am. Law Inst. 1933) .....

INTEREST OF *AMICI*[1]

Amici[2] are former State Attorneys General, former United States Department of Justice Officials, and Professors of Criminal Law who, through their many years of public service and/or scholarship, have sought to preserve the critical balance between effective law enforcement and respect for civil liberties. *Amici* steadfastly support the guarantee of religious liberty secured by the First Amendment to the United States Constitution and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*. *Amici* therefore endorse the Departments'[3] provision of an exemption of certain religious non-profit organizations ("Qualified Religious Organizations") from the contraception coverage requirement (the "Coverage Requirement") imposed by the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119, and its implementing regulations (this is exemption referred to herein as the "Accommodation").

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1. Pursuant to Rules 37.3 and 37.6 of the Rules of the Supreme Court, all parties have consented to the filing of this *amici curiae* brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party made any monetary contribution to fund the preparation or submission of this brief. In addition, no persons or entities other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief.

2. *Amici* are individually identified in Appendix A.

3. The "Departments" are the Department of Health and Human Services ("HHS"), Labor, and Treasury, which were jointly responsible for developing the Accommodation.

Indeed, this Court recommended the Accommodation as a potential resolution of certain closely-held for-profit corporations' religious objections to the Coverage Requirement in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014). In light of that decision, *Amici* believe the Accommodation strikes an appropriate balance between respecting religious objections to providing health insurance coverage for contraceptives and preserving the compelling governmental interest in maximizing patient access to these and other preventative health care services. To invoke the Accommodation, a Qualified Religious Organization need only submit a written objection to providing contraceptive coverage and identify its insurer or, if self-insured, its third-party administrator ("TPA"). Once it does so, such an organization is entirely relieved of any obligation to cover contraceptive services. HHS, in turn, is able to secure no-cost contraceptive services in an efficient manner for any of the Qualified Religious Organization's employees and covered beneficiaries who seek them.

Notwithstanding the Accommodation's exemption of Petitioners from the Coverage Requirement, Petitioners insist that the Accommodation violates RFRA nonetheless. Petitioners' position boils down to an objection to complying with a legal obligation to submit a truthful written statement – *i.e.*, that they object to providing such healthcare coverage on religious grounds. As former law enforcement officials and criminal law experts, *Amici* understand first-hand that each citizen's compliance with the obligation to tell the truth in response to governmental inquiries is critical to the proper functioning of government. Petitioners' contention that this simple, yet essential civic obligation substantially burdens their religious exercise

in violation of RFRA stretches the statute beyond recognition and, if credited, would confer unbounded immunity on those who lodge religious objections to responding truthfully to governmental inquiries.

Amici are also concerned by the effort of certain of Petitioners' *Amici* to defend this position by a strained analogy to the law of secondary criminal liability. *See generally*, Brief of *Amici Curiae* Former Justice Department Officials In Support of Petitioners (herein the "Ashcroft Amici" and "Ashcroft Br."). They argue that, because Petitioners' submission of an opt-out notice "triggers" their insurers' or TPAs' provision of contraceptive coverage to Petitioners' employees, Petitioners are morally culpable for that result, just as an individual or corporation may be held criminally liable for aiding and abetting a third-party's criminal conduct. *See* Ashcroft Br. 11 ("If an individual becomes criminally complicit by providing a car or a meeting place knowing the purpose for which it will be used, then Petitioners' argument that the regulatory arrangement makes them morally complicit should be recognizable to the courts."). This argument misapprehends the law of secondary criminal liability, mischaracterizes how insurance coverage for contraceptive services is provided pursuant the Accommodation, and ignores RFRA's governing "substantial burden" legal standard.

STATEMENT AND SUMMARY OF ARGUMENT

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), this Court recognized that the Accommodation "effectively exempt[s]" Qualified Religious Organizations from the Coverage Requirement and that all such

organizations must do "[t]o qualify for this accommodation" is "certify that [they]... oppose[] providing [contraceptive] coverage . . . on account of religious objections." *Id.* at 2763. This Court further explained that "[w]hen a group health-insurance issuer receives notice that one of its clients has invoked [the Accommodation], the issuer must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing on the eligible organization, its insurance plan, or its employee beneficiaries." *Id.* This Court found that the Accommodation, if extended to closely-held for-profit entities that object to the Coverage Requirement on religious grounds, would not "impinge on [their] religious belief that providing insurance coverage for the contraceptives at issue violates their religion." *Id.* at 2782.

This Court's assessment of the Accommodation in *Hobby Lobby* applies with equal force here. Simply put, the Accommodation requires a Qualified Religious Organization to tell the truth – by stating whether it objects to providing coverage of contraceptive services on religious grounds and identifying its insurer or TPA. Once this occurs, the Qualified Religious Organization is absolved of any obligation to provide insurance coverage for contraceptive services to its employees and plays no role whatsoever in its insurer's or TPA's separate coverage of contraceptive services to its employees. Indeed, the Qualified Religious Organization does not even receive notice of whether any of its employees has sought or obtained coverage of contraceptive services, all or some of whom may in fact never do so. The Accommodation thus imposes no burden, let alone a "substantial" burden, on Petitioners' exercise of their religious objections to providing coverage for contraceptive healthcare.

Nonetheless, Petitioners insist that the mere act of providing the truthful statement required to invoke the Accommodation confers "moral complicity" for the provision of contraceptive health care to their employees. *See* Zubik Br. 2, 32, 49; East Tx. Br. 20, 51. According to Petitioners, because RFRA prohibits courts from "second guessing" the sincerity or correctness of their religious convictions, their assertions that compliance with the Accommodation's notice requirement is morally repugnant to them ends the inquiry. *See* Zubik Br. 32, 41; East Tx. Br. 2, 39, 46-51. This interpretation of RFRA is directly contradicted by the statute's plain language, legislative history, and case law, which require courts to conduct an objective legal assessment of whether the government has imposed a substantial burden on an individual's or organization's free exercise of religion.

The Ashcroft Amici also attempt to justify Petitioner's assertions based on analogy to the law of secondary criminal liability. Just as committing a seemingly *de minimis* act that aids a third-party's commission of a crime can subject a person to secondary criminal liability, argue the Ashcroft Amici, so Petitioners' seemingly benign act of opting out of the Coverage Requirement makes them morally complicit for the third-party provision of contraceptive healthcare coverage to Petitioners' employees that results from that action. As shown below, this deeply flawed analogy to criminal law fails to support Petitioners' theory of "moral culpability" because, among other things, Petitioners' legally-compelled submission of an opt-out notice does not constitute the sort of voluntary and intentional action that the imposition of secondary criminal liability requires. And in any event, the Ashcroft Amici's reference to principles of secondary liability falls

far short of the dispositive objective assessment of whether the Accommodation imposes a substantial burden on Petitioners' exercise of their religion.

ARGUMENT

I. PETITIONERS' "MORAL COMPLICITY" CLAIM DOES NOT SATISFY RFRA'S SUBSTANTIAL BURDEN STANDARD

Petitioners and the Ashcroft Amici argue that the Accommodation violates RFRA because it "makes them complicit" in an "overall scheme to deliver contraceptives or abortifacients" in violation of their religious beliefs. Ashcroft Br. 6-7. Petitioners and the Ashcroft Amici further argue that their subjective beliefs as to their moral complicity is sufficient to establish a RFRA violation, and that courts are not permitted to second-guess those subjective beliefs. *See* Ashcroft Br. 7 ("What amounts to facilitating immoral conduct, scandal, and material or impermissible cooperation with evil are inherently theological questions.") (internal citations omitted); *see also* Zubik Br. 32 ("courts cannot second-guess religious objections"); East Tx. Br. 48-49. This argument fundamentally misunderstands the governing legal standard under RFRA and the role of the courts in construing its text.

As an initial matter "moral complicity" is a concept found nowhere in RFRA or the debates which preceded its enactment. Rather, RFRA bars the government from imposing a "substantial[] burden" on a person's religious exercise. 42 U.S.C. § 2000bb—1(a). Moreover, whether the government has imposed a substantial burden is neither a

subjective nor a moral question for the parties to answer but rather an objective legal issue to be determined by a court. Although courts may not scrutinize "the place of a particular belief in a religion or the plausibility of a religious claim," *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 887 (1999), RFRA requires courts to assess whether "government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,'" *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)). Accordingly, Petitioners fail to state a *prima facie* claim under RFRA where, as here, they cannot establish that the challenged law substantially burdens their religious exercise. *See Hobby Lobby*, 134 S. Ct. at 2761 (RFRA plaintiff may be entitled to exemption from challenged rule *only "[i]f* the Government substantially burdens a person's exercise." (emphasis added)). As all but one of the Courts of Appeals to consider the issue have held, based on the objective facts, the Accommodation imposes no such substantial burden.

A. Substantial Burden Is An Objective, Legal Question To Be Answered By Courts.

The "substantial burden" test comes directly from RFRA's text. *See* 42 U.S.C. § 2000bb—1(a) (providing that the federal government "shall not *substantially* burden a person's exercise of religion" (emphasis added)). RFRA's legislative history establishes that the word "substantial" was added by Congress to distinguish between *de minimis* burdens and those burdens legally sufficient to violate the statute. 139 Cong. Rec. S14352 (daily ed. Oct 26, 1993) (statements of Sen. Kennedy and Sen. Hatch). As the Tenth Circuit recognized, "[i]f plaintiffs could

assert and establish that a burden is 'substantial' without any possibility of judicial scrutiny, the word 'substantial' would become wholly devoid of independent meaning." *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (requiring courts to "give effect . . . to every clause and word" of a statute). To hold otherwise would require the Court to accept a litigant's assertions that the government's challenged conduct imposes a substantial burden on the free exercise of their religion and immunize those assertions from judicial review. *See Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 218 (2d Cir. 2015) ("[T]his position would require us to accept a RFRA claimant's understanding of what the challenged law requires her to do (or to refrain from doing), even if that subjective understanding is at odds with what the law actually requires."); *Bowen v. Roy*, 476 U.S. 693, 702 (1986) (noting that this "Court has steadfastly maintained that claims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government"). Nothing in this Court's jurisprudence would countenance such a result, as the authorities in Petitioners' own briefs show. *See id.*; *Hobby Lobby*, 134 S. Ct. at 2775-76 (noting that the Coverage Requirement "demand[ed] that [the RFRA claimants] engage in conduct that seriously violates their religious beliefs," but analyzing the "economic consequences" of claimants' non-compliance to determine whether the burden was substantial); East Tex. Br. 53-54; Zubik Br. 45-47.

Such a holding would be particularly problematic here, where the "substantial burden" question presents two distinct legal issues only an Article III court is empowered

to resolve: (i) what conduct the ACA requires of Petitioners to invoke the Accommodation and (ii) whether that conduct imposes a substantial burden sufficient to violate RFRA. *See Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 747 (6th Cir. 2015) (court must determine "how the regulatory measure *actually works*—*i.e.*, what the law actually requires of the various actors (the non-profit entity, the insurer or the TPA, and the federal government)"); *see also Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 612 (7th Cir. 2015) ("Although Notre Dame is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces Notre Dame to act in a way that would violate those beliefs."); *Roy*, 476 U.S. at 701 n.6 ("[F]or the adjudication of a [Free Exercise] claim, the Constitution, rather than an individual's religion, must supply the frame of reference.").

Indeed, seven of the eight appellate courts to consider the issue in this context have recognized that whether the Accommodation substantially burdens Petitioners' religious exercise is a *legal* and *objective* question that a court must answer. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247-49 (D.C. Cir. 2014) ("Whether a law substantially burdens religious exercise is a question of law for courts to decide, not a question of fact."); *Little Sisters of the Poor*, 794 F.3d at 1176 ("[W]hether a law substantially burdens religious exercise . . . is a matter for courts—not plaintiffs—to decide"); *E. Tex. Baptist Univ. v. Burwell*, 739 F.3d 449, 457 (5th Cir. 2015) (same); *Univ. of Notre Dame*, 786 F.3d at 612 (same); *Geneva Coll. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 436 (3d Cir. 2015) (same); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014) (same); *Catholic Health Care Sys.*, 796 F.3d at 217 (same).

The notion that the Court must accept, without further analysis, Petitioners' subjective view that the Accommodation imposes a substantial burden on the free exercise of their religion because it makes them "morally complicit" fails to directly confront the dispositive legal question of whether the Accommodation imposes a substantial burden.

B. The Accommodation Does Not Impose A Substantial Burden On Petitioners' Religious Exercise.

The Accommodation does not substantially burden Petitioners' religious exercise. As this Court has already held, the only step an objecting organization must take "to qualify for this accommodation" is to "certify that it is [a religious] organization" and "opposes providing [contraceptive] coverage . . . on account of religious objections." *Hobby Lobby*, 134 S. Ct. at 2763. Petitioners admit that the notification requirement *alone* does not burden their religious exercise. East Tx. Br. 38-39 ("If all the government wanted from petitioners were to know that they want to opt out of the contraceptive mandate, then this litigation would have ended the day it began."). And Petitioners do not object to their employees obtaining contraceptive healthcare by other means. *See* East Tx. Br. 2 ("To be clear, petitioners do no object to *any* government action that provides contraceptives to their employees."); Zubik. Br. 3 ("Although Petitioners . . . disagree with the Government's goal of providing the mandated coverage, they do not challenge the legality of this goal [and] they have proposed less-restrictive alternatives where women could receive such coverage without involving Petitioners.").

Petitioners instead object to the notification requirement because it is "an affirmative step . . . necessary to get contraceptive coverage to their employees through the plan infrastructure that petitioners created and maintain." East Tx. Br. 39. In Petitioners' view, the notification requirement is objectionable because it *causes* the TPAs and insurers to provide contraceptive coverage to their employees. *See* Zubik Br. 50 ("[B]y submitting the 'self-certification' or 'notice' [the Qualified Religious Organization] triggers the TPA's obligation to 'provide or arrange for payments for contraceptive service'"); Ashcroft Br. 10 ("[B]y taking an action that will obligate and enable their healthcare contractors and health coverage infrastructure to provide contraceptives, they facilitate that conduct.").

As numerous circuit courts have held, however, the notification requirement does not "trigger" the obligation to provide contraceptive healthcare coverage by insurers or TPAs. Resp. Br. 33-34, 37-41, 47-49; *see e.g.*, *Catholic Health Care Sys.*, 796 F.3d at 222 ("The accommodation functions not as a 'trigger,' but rather as a means of identifying and exempting those employers with religious identifications."); *Univ. of Notre Dame*, 786 F.3d at 614-15 ("Notre Dame's signing the form no more 'triggers' [its insurer's] obligation to provide contraceptive services than a tortfeasor's declaring bankruptcy 'triggers' his co-tortfeasors' joint and several liability."). It is *federal law*, and not any action by Petitioners, that causes insurers and TPAs to provide separate coverage to Petitioners' employees. *See e.g.*, *E. Tex. Baptist Univ.*, 793 F.3d at 459 ("[P]laintiffs cannot authorize or trigger what others are already required by law to do."); *Geneva Coll.*, 778 F.3d at 437 ("*Federal law*, rather than any involvement by the

appellees in filling out or submitting the self-certification form, creates the obligation of the insurance issuers and third-party administrators to provide [contraceptive] coverage." (emphasis in original)).

Moreover, once the certification is complete, Petitioners have no role in the provision of contraceptive coverage. By design, the Accommodation "totally removes the [Petitioners] from providing those services." *Geneva Coll.*, 778 F.3d. at 441. "The requisite notice *extinguishes* the religious organization's obligation to contract, arrange, pay or refer for any coverage that includes contraception" and alternatively arranges for contraceptive coverage to be provided by insurers and TPAs separate and apart from Petitioners' other health plan. *Priests for Life*, 772 F.3d at 236. "Specifically, the regulations:

- require that the group health plan insurer *expressly exclude* contraceptive coverage from the eligible organization's group health plan.

- *fully divorce* the eligible organization from payments for contraceptive coverage.

- require that the insurer or TPA notify the beneficiaries in *separate mailings* that it will be providing separate contraceptive coverage.

- require that the insurer or TPA specify to the beneficiaries in those separate mailing that their employer is *in no way 'administering or funding'* the contraceptive coverage . . . [and]

- demand *separate mailing and accounting* on the part of the insurer or TPA, keeping contraceptive coverage separate for all purposes from the eligible organization's plan that exclude it."

Id. at 250. (internal citations omitted) (emphasis added).

Nor is Petitioners' private property being "commandeered" or "hijacked" and used as "conduits" or "vehicles" for the provision of contraceptive coverage. Ashcroft Br. 20; *Priests for Life*, 772 F.3d at 237. Once an opt-out certification is filed, the ACA regulations specifically prohibit the inclusion of contraceptive coverage in Petitioners' health plans, *see* 45 C.F.R. § 147.131(c)(2)(i)(A), and no other "infrastructure" owned or controlled by Petitioners is used by TPAs or insurers to provide separate contraceptive coverage. *See Catholic Health Care Sys.*, 796 F.3d at 212-13; *Priests for Life*, 772 F.3d at 253. To the extent "infrastructure" refers to Petitioners' existing relationships with their employees and insurers or TPAs, these relationships "do not provide them an avenue to dictate these entities' independent interactions with the government" or each other. *Catholic Health Care*, 796 F.3d at 224; *see also Priests for Life*, 772 F.3d at 256 ("RFRA does not entitle Plaintiffs to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled."). As demonstrated above, Petitioners cannot establish that the accommodation substantially burdens their religious exercise.

II. PETITIONERS' "MORAL COMPLICITY" CLAIM HAS NO ANALOGY IN THE LAW OF SECONDARY CRIMINAL LIABILITY

None of the legal theories of complicity advanced by Petitioners or the Ashcroft Amici alter this conclusion. The Ashcroft Amici attempt to support Petitioners' "moral complicity" argument by reference to the law of secondary criminal liability: just as a person can be held criminally liable for committing a seemingly minor and benign act that furthers a third-party's commission of criminal conduct, they contend, a person can be morally liable for providing contraceptive health care by committing a seemingly minor and benign act that furthers a third-party's coverage of contraceptives. *See* Ashcroft Br. 4-15. This theory fails in numerous respects.

A. Criminal Complicity Requires Intent to Facilitate The Commission of An Offense.

The fundamental error in the Ashcroft Amici's analogy can be traced to their misunderstanding of the *mens rea* element required for secondary liability. Relying on this Court's recent decision in *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Ashcroft Amici suggest that, under federal law, the mental state required to be liable for aiding and abetting is merely knowledge. Ashcroft Br. 10 (citing *Rosemond*, 134 S. Ct. at 1249). This is incorrect.

As the Court recently explained in *Rosemond* under both the common law and the federal aiding and abetting statute, a person is liable "for aiding and abetting a crime if (and *only if*) he (1) takes an affirmative act in furtherance of that offense, (2) with the *intent of facilitating the*

offense's commission." *Id.* at 1245 (emphases added); *see also* 2 Wayne R. LaFave, Substantive Criminal Law § 13.2, p. 337 (2003) (an accomplice is liable as a principal when he gives "assistance or encouragement . . . with the *intent* thereby to promote or facilitate commission of the crime" (emphasis added)); *Hicks v. United States*, 150 U.S. 442, 449 (1893) (an accomplice is liable when his acts of assistance are done "with the *intention* of encouraging and abetting [the crime]" (emphasis added)). This means that, "[t]o aid and abet a crime, a defendant must not just in some sort associate himself with the venture, but also 'participate in it as in something *that he wishes to bring about*' and '*seek by his action to make it succeed*.'" *Rosemond*, 134 S. Ct. at 1248 (citing *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)) (emphasis added).

The question before the Court in *Rosemond* was whether the defendant, an unarmed but active participant in a drug transaction, could be liable for aiding and abetting an armed drug sale under 18 U.S.C. § 924(c) when he knew that one of his cohorts was carrying a gun. *Rosemond*, 134 S. Ct. at 1248-49. The Court concluded that a person who "*actively participates* in a criminal scheme knowing its extent and character" intends that scheme's commission. *Id.* (emphasis added). Under those circumstances, the Court reasoned, "the accomplice has decided to join in the criminal venture, and share in its benefits, with full awareness of its scope—that the plan calls not just for a drug sale, but for an armed one" and, in doing so, "he has *chosen . . . to align himself with the illegal scheme it its entirety*—including its use of a firearm." *Id.* 1249 (emphasis added). Thus, "[h]e may not have brought the gun to the drug deal himself, but because he took part in that deal knowing a confederate

would do so, he intended the commission of . . . an armed drug sale." *Id.*[4]

In holding that "active participat[ion]" in a criminal venture with full knowledge of the scheme's scope was sufficient to demonstrate the requisite intent, the Court made clear that neither *Rosemond* nor the cases cited therein addresses a circumstance in which criminal defendant "incidentally facilitate[s] a criminal venture," such as a hypothetical "owner of a gun store who sells a firearm to a criminal, knowing but not caring how the gun will be used." *Id.* at 1249 n.8. *See Pereira v. United States*, 347 U.S. 1, 11-12 (1954) (defendant's conviction for aiding and abetting mail fraud supported by evidence of his "collaboration and close cooperation in the fraud" coupled with knowledge that mail would be used); *Bozza* v. *United States*, 330 U.S. 160, 165, 167 (1947) (upholding conviction for aiding and abetting evasion of liquor taxes where defendant operated clandestine distillery knowing business was set up "to violate Government revenue laws"); *United States v. Akiti*, 701 F.3d 883, 887 (8th Cir 2012) (unarmed driver of getaway car's active participation in crime coupled with knowledge that his accomplices would use weapons sufficient to support conviction of aiding and abetting armed bank robbery); *United States v. Easter*, 66 F.3d 1018, 1024 (9th Cir. 1995) (same).

Neither *Rosemond* nor any of the other cases cited by the Ashcroft Amici supports the proposition that

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4. The Court found the District Court erred in failing to instruct the jury that it could convict Rosemond of aiding and abetting, specifically, an *armed* drug sale only if he knew his cohort was armed before the crime's commission. *See id.* at 1251-52.

knowledge coupled with an "incidental" act equivalent to Petitioners' submission of an opt-out notice satisfies the intent element of aiding and abetting. To the contrary, Courts have long held that, absent active participation, mere knowledge or expectation that a crime would be committed is insufficient to prove an intent to facilitate the crime's commission. For example, in *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938) (L. Hand, J.) the Second Circuit reversed Defendant Peoni's conviction as an accessory to and conspirator in a third-party's possession of counterfeit bills. Mr. Peoni had sold the bills to an initial buyer, who resold the bills to a second buyer Mr. Dorsey, who in turn used the bills in a transaction. *Id.* at 401-02. In securing his conviction for aiding Mr. Dorsey's crime, the Government asserted that, when Mr. Peoni first sold the bills, he knew his initial buyer would pass them to others, thereby rendering Mr. Peoni complicit in any such subsequent criminal transactions. *Id.* at 402. In ordering reversal, Judge Hand found this knowledge was insufficient to confer secondary liability. While Mr. Peoni's initial "utterance of the bills was indeed a step in the causal chain which ended in Dorsey's possession" of the bills, he had not participated in Mr. Dorsey's crime as "something that he wishe[d] to bring about." *Id.*

Petitioners' submission of an opt-out notice is thus not akin to "'provid[ing] [a] car' for a crime or 'provid[ing] [a] house for a meeting' to plan it," as the Ashcroft Amici mistakenly contend. Ashcroft Br. 9. Nor is it like "'act[ing] as a lookout,' 'man[ning] the getaway car,' or 'signal[ing] the approach of the victim.'" Ashcroft Br. 9 (*quoting* Wayne R. LaFave, Criminal Law 672-73 (4th ed. 2003)) (brackets in original). Each of these analogies addresses active, willing participation in a crime by supplying equipment essential

to its commission. As shown above, once they submit an opt-out certification, Petitioners are not supplying any goods or services in aid of the provision of contraceptive coverage. Petitioners' employees receive coverage without the knowledge or participation of Petitioners or the use of Petitioners' property.

In fact, neither Petitioners nor the Ashcroft Amici contend that the Accommodation causes Petitioners to be active and interested participants in the provision of contraceptive services, nor could they: Petitioners have made abundantly clear that the provision of contraceptives is *not* "something that [they] wish[] to bring about" and that they do *not* "seek by [their] action to make it succeed." *Rosemond*, 134 S. Ct. at 1248 (citing *Nye & Nissen*, 336 U.S. at 619 (quoting *Peoni*, 100 F.2d at 402)).

While neither Petitioners nor the Ashcroft Amici contend that the provision of insurance coverage for contraception services is illegal, if it were in fact illegal, the act of lodging *an objection* based on a sincerely held belief could not constitute aiding and abetting, even if by doing so it were to cause another to provide the services (which it does not). Thus, the objector would lack the necessary *mens rea* to find him or her culpable of aiding and abetting. *See* 2 Wayne R. LaFave, Substantive Criminal Law § 13.2 (2d ed. 2015) ("[E]ven if knowledge of the actor's intent (as opposed to sharing that intent) is otherwise sufficient, the accomplice must have *intended to give the aid or encouragement*" to be held liable. (emphasis added)).

B. Petitioners Could Not Be Held Vicariously Liable For Actions That Federal Law Compels Insurers and TPAs To Take.

The Ashcroft Amici further suggest that the Petitioners' theory of moral complicity is mirrored in the law of agency and in the Internal Revenue Code's expansive definition of "producer," which includes one who contracts with third parties to manufacture products. *See* Ashcroft Br. 14-15. These analogies are similarly misplaced.

Under accepted principles of agency law, for instance, a principal is liable for the conduct of its agent only if (1) the principal authorized such conduct; (2) the principal "apparently authorized" such conduct; or (3) the agent has inherent "power arising from [the nature] of the agency relationship" to engage in such conduct. Rest. (First) Agency § 140 (Am. Law Inst. 1933). A principal's liability for the torts of its agent is even more tightly circumscribed, attaching, with few exceptions, only when the principal directs the conduct of the agent, *intending* the conduct or its consequences. Rest. (First) Agency § 212 ("A person is subject to liability for the consequences of another's conduct which results from *his directions* as he would be for his own personal conduct if, with knowledge of the conditions, he *intends the conduct*, or if he *intends its consequences*." (emphases added)). Proof of causation is also required before liability can be imposed: An agent's tortious conduct is attributable to its principal "only if the conduct of the agent . . . results from the directions of the principal." Rest. (First) Agency § 212 cmt. f. (noting that the principal's "command must be a [substantial] factor in causing the [tortious] act").

No support for Petitioners' theory can be found in the law of agency, therefore, for at least the following three reasons. First, while Petitioners have contractual relationships with the insurers and TPAs, it is undisputed that Petitioners have not authorized them to provide contraceptive services. In fact, the Accommodation requires that the group health plan of an objecting Qualified Religious Organization *expressly exclude* contraceptive coverage for the organization's employees. *See Priests for Life*, 772 F.3d at 250 (citing 45 C.F.R. § 147.131(c)(2)(i)(A)). Thus, under agency law, Petitioners could not be held liable for the insurers' and TPAs' "illegal" provision of contraceptives because they lack actual, apparent, or inherent authority to do so.

Second, Petitioners would not be liable under agency law as it relates to torts for the actions insurers and TPAs are required to take under the Accommodation. Again, there is no dispute that Petitioners have not directed their insurers or TPAs to provide contraceptives. To the contrary, Petitioners have unequivocally directed their insurers and TPAs *not* to provide the objectionable services under their contracts. East Tx. Br. 1 ("Each petitioner offers its employees a generous healthcare plan, but each excludes from its plan coverage for contraceptives to which it holds religious objections."); Zubik Br. 2 ("Petitioners have been careful to craft their insurance plans to exclude coverage for abortifacients, contraceptives, and sterilization."). And by opting out via the Accommodation and availing themselves of the opportunity to lodge their religious objections, Petitioners also make clear that they do not intend that the insurers and TPAs provide contraceptives.

Third, there is no legally significant causal link between Petitioners' decision to opt out via the Accommodation and their insurers' or TPAs' obligations to provide coverage for contraceptive services. *See Catholic Health Care Sys.*, 796 F.3d at 222; *Univ. of Notre Dame*, 786 F.3d at 614-15; *Priests for Life*, 772 F.3d at 252-53; *Mich. Catholic Conference*, 807 F.3d at 749-50; *Little Sisters of the Poor*, 794 F.3d at 11; *Geneva Coll.*, 778 F.3d at 437-40; *E. Tex. Baptist Univ.*, 793 F.3d at 459-61. Federal law imposes those obligations *independent* of Petitioners' actions. *See supra* Part I.B.

The Ashcroft Amici's analogy to the tax code in support of a secondary moral complicity theory fares no better. While the Ashcroft Amici correctly point out that a company cannot avoid being taxed as a "producer" under Section 263A of the Internal Revenue Code by contracting to have a third party assemble its finished products, see Ashcroft Br. 14 (citing *Suzy's Zoo v. Comm'r*, 273 F.3d 847, 879 (9th Cir. 2001) and *Charles Peckat Mfg. Co. v. Jarecki*, 196 F.2d 849, 851 (7th Cir. 1952)), this is simply because the tax code defines who is a "producer" based on who owns the property produced rather than who completes the production of that property. *See Suzy's Zoo*, 273 F.3d at 880 (citing I.R.C. § 263A and Treas. Reg. § 1.263A-2(a)(1)(ii)(A)). As shown above, under the Accommodation, Petitioners neither "own" nor "produce" the structure through which their employees receive coverage for contraceptive services. Tax law governing a company's tax liability as a "producer" thus offers no support for Petitioners' theory of moral complicity.

III. PETITIONERS' OBJECTION TO PROVIDING TRUTHFUL INFORMATION TO OBTAIN AN EXEMPTION FROM THE COVERAGE REQUIREMENT THREATENS TO ERODE THE PROPER FUNCTIONING OF GOVERNMENT

Given that the Accommodation effectively removes Petitioners from the process by which their employees may obtain coverage for contraceptive healthcare, Petitioners' position reduces to an objection to providing written notice of their decision to opt out of the Coverage Requirement. Petitioners contend that this simple act, which merely requires them to provide truthful information consistent with federal law, imposes a substantial burden because the government will use the information to supply contraceptive coverage to Petitioners' employees. Importantly, Petitioners do not contest that the government may provide their employees access to contraceptive healthcare, see East Tx. Br. 2 ("To be clear, petitioners do not object to *any* government action that provides contraceptives to their employees."); Zubik. Br. 3 (suggesting alternative ways the government can provide women with contraceptive healthcare), and the D.C. Circuit has expressly found that the federal government has a compelling interest in maximizing insurance coverage for such care, including to the employees of organizations that decline to provide coverage on religious grounds. *See Priests for Life*, 772 F.3d at 257-64. Petitioners thus contend that RFRA bars the federal government from mandating that Qualified Religious Organizations provide truthful information that is necessary for the furtherance of the federal government's compelling interest in maximizing the availability of contraception services to American citizens.

Leaving aside the myriad legal deficiencies with Petitioners' arguments, if adopted by this Court, the policy implications of Petitioners' position would be both widespread and profound. All branches of state and federal government – from law enforcement agencies to tax authorities – rely on the receipt of truthful information in performing their essential functions. Indeed, *Amici* have witnessed first-hand the detrimental impact on governmental functions of individuals' or corporations' refusal to supply essential information. Accepting Petitioners' argument that providing truthful information in response to a routine governmental inquiry imposes an undue burden on a person's religious exercise, at least where the person has a religious objection to the Government's use of the information, would open the door to a host of similar potential RFRA claims which likewise seek immunity from providing truthful information necessary for the performance of essential government functions. In the view of *Amici*, the potential consequences of such an outcome are dire.

CONCLUSION

For the foregoing reasons, the judgments of the Third, Fifth, Tenth, and D.C. Circuits should be upheld.

Respectfully submitted,

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